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Seeing is Believing: The Detainee Abuse Photos and "Open" Government's Enduring Resistance to Their Release During an Age of Terror

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SEEING IS BELIEVING: THE DETAINEE ABUSE PHOTOS AND "OPEN" GOVERNMENT'S ENDURING RESISTANCE TO THEIR RELEASE DURING AN AGE OF TERROR

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"[W]herever the people are well informed they can be trusted with their own government; . . . whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights."[1]

I. INTRODUCTION

Succinctly stated, "[p]hotographs have an impact that goes beyond what words and descriptions can convey."[2] When the written word fails to fully inform, photographs offer journalists an alternative, and more powerful, means by which to "sway public opinion."[3] The years following the attacks of September 11, 2001, became an unyielding testament to this self-evident adage. The issue first arose after the Bush administration, in the wake of 9/11, instituted an extensive plan to detain individuals purportedly connected to the attacks or other terrorist activities.[4] Then, beginning in late December 2002, media outlets bombarded the American public with unforgiving accounts detailing the systematic torture of detainees held by U.S. armed forces in Iraq and Afghanistan.[5] These early narratives exposed ineluctable truths: while overseas, U.S. soldiers immobilized detainees for long periods of time, "deprived them of sleep for days on end," and on several occasions, forced prisoners to "stand[] naked, hooded" with "their arms raised and chained to the ceiling" and "their feet shackled, unable to move for hours at a time."[6] Reports further indicated that the Central Intelligence

1. Letter from Thomas Jefferson to Richard Price (Jan. 8, 1789), *available at* http://www.loc.gov/exhibits/jefferson/60.html.

2. Richard J. Dalton, *Media Firestorm; Photos Ignited 'A Powder Keg,'* NEWSDAY, May 9, 2004, at A29.

3. Clay Calvert, *Voyeur War? The First Amendment, Privacy and Images from the War on Terrorism*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 147, 166 (2004). *See also* Brief for the Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Respondents, Dep't of Def. v. ACLU (*ACLU III*), 130 S. Ct. 777 (2009) (mem.) (No. 09-160), 2009 WL 2876182, at *10 ("Images convey matters of importance in a unique way. Visual images are more searing than words. They tell an entire story instantly and can be so powerful as to call people to action.").

4. Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1148-49 (2007).

5. *See, e.g.*, Carlotta Gall, *U.S. Military Investigating Death of Afghan in Custody*, N.Y. TIMES, Mar. 4, 2003, at A14.

6. *See id.*

Agency (CIA) tacitly condoned these practices when it moved "dozens of detainees," in a process of "rendition," to countries known for the use of torture.[7] Despite these stories, the Bush administration "publicly disavowed" such practices at every turn.[8]

In April 2004, when 60 Minutes II, a CBS broadcast, became the first television news program to obtain explicit photos corroborating the print media's accusations, it had, as First Amendment scholar Clay Calvert articulated, "an ethical obligation to release [them]."[9] Once disseminated, these photos confirmed, in shocking detail, abuse by U.S. soldiers of prisoners held at the Abu Ghraib detention center in Iraq. Finally, the formerly unsubstantiated stories that cataloged the federal government's "policies of kidnapping potential opponents, then secreting them in 'black sites' while subjecting them to incommunicado detention, psychic pressure, coercive interrogation, and physical abuse" became part of the War on Terror's "dragnet" reality.[10]

After the photos were published, fears amassed that torture inflicted by U.S. soldiers abroad was a far more prevalent problem than the Abu Ghraib photos revealed, possibly extending to other U.S. detention facilities in Afghanistan and Iraq.[11] Reacting to those fears, the American Civil Liberties Union (ACLU) commenced *ACLU v. Department of Defense* and invoked the Freedom of Information Act's (FOIA) Section 552(a)(3), FOIA's disclosure-request mechanism, to challenge several executive-branch agencies' concerted refusals to release additional photographs and related information concerning alleged detainee abuse at U.S. detention facilities abroad.[12] The photos were but one part of various files the U.S. Army had compiled to criminally investigate soldier misconduct overseas.[13]

Turning to FOIA's implicit goals to ensure an informed citizenry and cultivate government accountability, the ACLU sought access to the unpublished photos to better assess our nation's abidance with domestic

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7. David E. Kaplan et al., *Playing Offense*, U.S. NEWS & WORLD REP., June 2, 2003, at 18 ("The CIA has helped move dozens of detainees not only to Jordan but also to Egypt, Morocco, and even Syria.").

8. Kreimer, *supra* note 4, at 1185-86.

9. Calvert, *supra* note 3, at 165. *See also 60 Minutes II: Abuse of Iraqi POWs by GIs Probed* (CBS television broadcast Apr. 27, 2004), *available at* http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml.

10. Kreimer, *supra* note 4, at 1187.

11. HUMAN RIGHTS FIRST, BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 1 (2006), *available at* http://www.hrw.org/en/reports/2006/04/25/numbers.

12. *See* ACLU v. Dep't of Def. (*ACLU II*), 543 F.3d 59, 63-65 (2d Cir. 2008), *vacated*, 139 S. Ct. 777 (2009) (mem.).

13. *See id.* at 65.

and international law.[14] In opposition, the Bush administration exclusively relied upon several of FOIA's statutory exemptions, which authorize the withholding of otherwise accessible information when overriding interests for nondisclosure are apparent.[15] Those interests include, among others, national security, personal privacy, and endangerment to life or physical safety.[16] Because of the Bush administration's unprecedented levels of governmental secrecy following 9/11, however, what began as simple FOIA requests transformed into a years-long ideological battle played out in the federal court system.

During the next four years, the lower federal courts aligned in judgment: no matter what the Bush administration understood FOIA's exemptions to mean, none applied to bar the release of the detainee abuse photos.[17] It was under a new administration—one over which President Obama presided—that the FOIA litigation would finally reach its apex. When elected, President Obama appeared forthright; transparency and the rule of law were to be his guideposts. Nevertheless, President Obama concomitantly reversed his vow to disclose the abuse photos and urged Congress to change the law, advancing concerns for national security and the safety of troops and U.S. citizens abroad.[18] Accordingly, in October 2009, Congress passed, and President Obama signed into law, the Protected National Security Documents Act of 2009, reversing the federal courts' holdings, superseding FOIA's overarching principles, and protecting from disclosure all detainee abuse images that were taken between September 11, 2001, and President Obama's inauguration.[19] Spurred by these outcomes, this Note attempts to address whether today's War on Terror warrants the government's recent transition toward prolonged secrecy and away from democratic notions of transparency.

Part II begins by briefly outlining FOIA's development and its statutory objectives. It then examines FOIA's exemption structure, particularly focusing on three exemptions implicated by the disclosure

14. *See* Letter from Amrit Singh, Staff Attorney, ACLU, to Freedom of Information Officer (Oct. 7, 2003) [hereinafter ACLU FOIA Request], *available at* http://www.aclu.org/torturefoia/legaldocuments/nnACLUFOIArequest.pdf.

15. *See ACLU II*, 543 F.3d at 63-64.

16. *See generally* Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9) (2006) (enumerating nine areas to which FOIA does not apply).

17. *See ACLU II*, 543 F.3d at 63-65.

18. *See* Barack Obama, Remarks by the President on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ [hereinafter Obama Remarks].

19. *See* Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, 123 Stat. 2142 (Oct. 28, 2009); Protected National Security Documents Act of 2009, § 565, 123 Stat. at 2184-85.

of the detainee abuse photos, and concludes by discussing the manner in which presidential policy often manipulates FOIA's framework to restrict public access to government-held information. Part III traces the ACLU's efforts to expose the Bush administration's policy of coercive interrogation techniques. It sets forth the ACLU's legal battle against the federal government to uncover the abuse photos. At the center of this controversy lie FOIA and the judicial opinions that interpret its provisions. Part III concludes by discussing how President Obama's change in policy dismantled the ACLU's numerous successes within the federal courts. Part IV evaluates the Protected National Security Documents Act of 2009, its failure to comport with FOIA's principles, and its inflexible mandate to keep secret the remaining unpublished detainee abuse photos. Finally, Part V reflects upon this nation's continued need for transparency, notwithstanding the government's current policies, which sanction concealment.

II. FOIA AS A MECHANISM FOR GOVERNMENTAL ACCOUNTABILITY

Secrecy stifles criticism and suppresses revelations of truth.[20] Conversely, "freedom of information," as a concept, connotes "access by individuals as a presumptive right to information held by public authorities."[21] As a corollary to informational access, "openness" ensures a "responsible and responsive government."[22] Together, both "freedom of information" and "openness" comprise the American public's modern-day right to governmental transparency and are essential to a well-functioning democracy.[23] As academics profess, if the public is fully apprised of how its government operates, the public's role "as an enlightened tribunal and collective decisionmaker" may be sustained.[24] The sum of these ideas informed Congress's passage of FOIA in 1966.[25] However, in the aftermath of September 11th, political developments, initiated by President George W. Bush and maintained by President Barack Obama, have created a climate of nondisclosure that unjustifiably retrenches FOIA's guarantees and shields from the

20. *See* Patrick Birkinshaw, *Freedom of Information and Openness: Fundamental Human Rights?*, 58 ADMIN. L. REV. 177, 195, 214 (2006) ("Secrecy protects corruption and brutality.").

21. *Id.* at 188.

22. *Id.* at 191.

23. *See id.* at 183-84 ("Transparency, openness, and access to government-held information are widely applauded as remedies for deficiencies and operations of government when government claims to be democratic . . . .").

24. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 896-97 (2006).

25. H.R. REP. NO. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423.

public evidence of governmental misconduct.[26] Citing concerns for both national security and the safety of troops abroad, the government has implicitly and explicitly rewritten FOIA's embodiment of accountability.

A. *An Overview of the Freedom of Information Act*

As contemporary principles dictate, FOIA is premised on the notion that executive-branch agency records should be "accessible" to the public.[27] Embracing these principles, the nation's highest court has previously recognized FOIA's purpose to ensure "an informed citizenry, [which is] vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[28] However, prior to FOIA's enactment, legislative philosophy did not always recognize the importance of public accessibility.[29] Indeed, FOIA's presumption of open access was largely a response to the national security crisis that plagued the Cold War era.[30]

Before 1966, the public's ability to obtain government information was nearly nonexistent; if denied access after a reasonable request, the public lacked any legal remedy.[31] However, following FOIA's enactment in 1966, the legislature departed from its comfortable cloak of secrecy and underwent an ideological change.[32] Vesting in the public

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26. Nick Baumann, *Gates Bars Torture Photos' Release*, MOTHER JONES, Nov. 13, 2009, *available at* http://motherjones.com/mojo/2009/11/gates-bars-torture-photos-release; Fenster, *supra* note 24, at 891; Kristen Elizabeth Uhl, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 272 (2003); Christina E. Wells, *"National Security" Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1196 (2004).

27. HOUSE OF REPRESENTATIVES COMM. ON GOV'T REFORM, 109TH CONG., A CITIZEN'S GUIDE ON USING THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS 3 (2005) [hereinafter CITIZEN'S GUIDE ON FOIA], *available at* http://www.fas.org/sgp/foia/citizen.pdf.

28. N.L.R.B. v. Robbins Tires & Rubber Co., 437 U.S. 214, 242 (1978).

29. *See* CITIZEN'S GUIDE ON FOIA, *supra* note 27, at 3.

30. *See* Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 517 (2006) ("The public and the press were hungry for information about world events that were both astonishing and alarming as dawn broke on the nuclear age, communism swept beyond Russia's borders, and the Cold War chilled international relations."); Uhl, *supra* note 26, at 266.

31. *See* CITIZEN'S GUIDE ON FOIA, *supra* note 27, at 3 ("Before enactment of the FOIA in 1966, the burden was on the individual to establish a right to examine these government records. There were no statutory guidelines [under the Administrative Procedure Act] to help a person seeking information. There were no judicial remedies for those denied access."); Halstuk & Chamberlin, *supra* note 30, at 517.

32. *See* CITIZEN'S GUIDE ON FOIA, *supra* note 27, at 3 (referring to the idea that, under

a "right-to-know" default, the legislature modified the nation's then-existing concept of governmental transparency (i.e., the "need-to-know" standard).[33] By shifting the burden of proof under the Administrative Procedure Act[34] (APA) to government agencies seeking nondisclosure,[35] FOIA created a newfound presumption in favor of openness and accountability.[36] Since FOIA's inception, the American public has legitimized the legislature's change in policy. That is, FOIA has evolved into "the primary means by which the public informs itself about its government, and it has been used to obtain information crucial to the public interest."[37]

By design, FOIA is "a requester-driven statute."[38] FOIA establishes a scheme whereby public parties,[39] without a showing of need or reason,[40] may request from an agency[41] the disclosure of any records sought.[42] The term "records," which is statutorily defined as "any

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FOIA, the government must now "justify the need for secrecy"). Importantly, FOIA "forms the backbone of our nation's right-to-know legal regime." David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1787 (2008).

33. *See* Uhl, *supra* note 26, at 267; *see also* CITIZEN'S GUIDE ON FOIA, *supra* note 27, at 3 ("[T]he 'need to know' standard has been replaced by a 'right to know' doctrine.").

34. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 500 (2006)).

35. Uhl, *supra* note 26, at 267; *see also* CITIZEN'S GUIDE ON FOIA, *supra* note 27, at 3 ("With the passage of the FOIA, the burden of proof shifted from the individual to the government.").

36. Uhl, *supra* note 26, at 266.

37. *Id.* at 267.

38. Vladeck, *supra* note 32, at 1789.

39. "[A]ny person" may make a FOIA request. 5 U.S.C. § 552(a)(3)(A). Under the Administrative Procedure Act (APA), "person" is a broad term that encompasses "individual[s], partnership[s], corporation[s], association[s], or public or private organization[s] other than an agency." *Id.* § 551(2) (setting forth the definition of "person"). Although FOIA does not define the term "person," FOIA does expressly incorporate the APA's definition for "agency." *See id.* § 552(f)(1). Because the APA defines the term "person," and FOIA does not, courts apply the APA's definition to the FOIA context, as well. *See, e.g.*, SAE Prods., Inc. v. FBI, 589 F. Supp. 2d 76, 80 (D.D.C. 2008) (stating that "[a] 'person,' as defined under FOIA, includes a corporation" (citing 5 U.S.C. § 551(2))).

40. *See, e.g.*, NARA v. Favish, 541 U.S. 157, 172 (2004) ("[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information.").

41. FOIA defines an "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency . . . ." 5 U.S.C. § 552(f)(1). Because Section 552(f)(1) incorporates Section 551 of the APA, which defines "agency" more fully, it is important to note that neither Congress nor the judiciary is subject to FOIA. *See id.* §§ 551(1)(a)-(1)(b).

42. *See id.* § 552(a)(3)(A). Additionally, any person's request to an agency under FOIA must "reasonably describe" the records requested and be "made in accordance with [that

information that would be an agency record . . . when maintained by an agency in any format,"[43] has been broadly interpreted by the judiciary to include reports, letters, manuals, *photographs*,[44] films, and sound recordings in digital form or otherwise.[45] Notwithstanding FOIA's breadth, its deceptively expansive "right to request" is, of course, subject to several limitations.[46] To state it quite plainly, by enacting FOIA, "Congress did not simply hand the public the keys to the government's filing cabinets."[47] Rather, to strike the appropriate balance between public disclosure and the need for some confidentiality to facilitate effective governance, the Act's lawmakers included nine express exemptions.[48] These exemptions are more fully examined in turn.

B. *Exemptions Implicated by a Potential Release of the Detainee Abuse Photos*

Juxtaposed against FOIA's ultimate goal to promote as much disclosure as possible lie the statute's codified exemptions.[49] Thus, to avoid disclosing information, a government agency must invoke one or more of these nine exceptions when responding to a legitimate FOIA request.[50] Although the types of information categorically excluded

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agency's] published rules stating the time, place, fees (if any), and procedures to be followed." *Id.* §§ 552(a)(3)(A)(i)-(ii).

43. *Id.* § 552(f)(2)(A).

44. *See Favish*, 541 U.S. at 164 (emphasis added) (noting that photographs are "records" under FOIA).

45. Halstuk & Chamberlin, *supra* note 30, at 516. The U.S. Supreme Court has broadened the term "records" to include "machine readable materials . . . regardless of physical form or characteristics," as defined in the Records Disposal Act. Forsham v. Harris, 445 U.S. 169, 183 (1980) (quoting Records Disposal Act, 44 U.S.C. § 3301 (1980)).

46. *See* 5 U.S.C. §§ 552(b)(2)(1)-(9) (listing nine areas to which FOIA does not apply).

47. Stephen Gidiere & Jason Forrester, *Balancing Homeland Security and Freedom of Information*, 16 NAT. RESOURCES & ENV'T 139, 139 (2002).

48. *See* 5 U.S.C. §§ 552(b)(2)(1)-(9); Halstuk & Chamberlin, *supra* note 30, at 516. *See also* John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (quoting H.R. REP. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423)) (finding that in enacting FOIA "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government" to protect certain information); Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (holding that "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act").

49. *See* WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 343 (7th ed. 2008) (noting that FOIA's fundamental purpose is "to promote as much disclosure of information as possible").

50. *See* OFFICE OF INFO. POL'Y, U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 5 (2009 ed.) [hereinafter GUIDE TO FOIA] (explaining that "the nine exemptions of the FOIA ordinarily provide the only bases for nondisclosure"), *available at* http://www.justice.gov/oip/foia_guide09.htm. *See also* 5 U.S.C. § 552(b) (providing that unless

from FOIA's reach are relatively few in number, it is not surprising that most disputes litigated under the statute resolve whether a requested record is subject to a particular exemption.[51] If the applicability of an exemption is litigated, FOIA expressly authorizes district courts to review the records in camera and determine, de novo, whether an agency's decision to apply an exemption was appropriate.[52] Notwithstanding this statutorily imposed judicial oversight, the exemptions' litigious quality necessitates further analysis, especially in light of the government's tendency to invoke them to withhold sensitive information. The subsections that follow explore the three FOIA exemptions implicated by the detainee abuse photos' potential release.

1. Exemption 1: National Security or Foreign Policy

Pursuant to Exemption 1, FOIA currently excludes from disclosure "properly classified" information "specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy."[53] This two-pronged approach permits the president, and not FOIA, to establish rules by which properly classified national security materials are to be withheld.[54] Dating back to Harry S. Truman's presidency, every president since 1951 has established a uniform policy, via executive order, setting forth procedural and substantive guidelines for proper classification decisions.[55] Therefore, a record's Exemption 1 protection is conditioned upon the record satisfying, in whole, the applicable executive order's classification requirements.

Today, the operative executive order to which Exemption 1 refers is

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one of the nine enumerated exceptions applies, requested information is subject to FOIA's disclosure requirements).

51. FOX, *supra* note 49, at 347-48. *See also* U.S. Dep't of Justice, *Summaries of New Decisions–January 2010*, FOIA POST, Feb. 19, 2010, http://www.justice.gov/oip/foiapost/2010 foiapost3.htm (listing summaries of court decisions that the Office of Information Policy, a Department of Justice affiliate, received during the month of January 2010, the majority of which resolve an exemption classification).

52. *See* 5 U.S.C. § 552(a)(4)(B).

53. *Id.* § 552(b)(1).

54. *See, e.g.*, Exec. Order No. 13,292, 3 C.F.R. 198 (2003), *amending* Exec. Order No. 12,958, 3 C.F.R. 334 (1995).

55. GUIDE TO FOIA, *supra* note 50, at 142. *See, e.g.*, Exec. Order No. 13,142, 75 Fed. Reg. 707 (Dec. 29, 2009) (Obama order); Exec. Order No. 13,292, 3 C.F.R. 196 (Bush order); Exec. Order No. 12,958, 3 C.F.R. 334 (1995) (Clinton order); Exec. Order No. 12,356, 3 C.F.R. 167 (1982) (Reagan order); Exec. Order No. 12,065, 3 C.F.R. 191 (1978) (Carter order); Exec. Order No. 11,862, 40 Fed. Reg. 25,197 (June 11, 1975) (Ford order); Exec. Order No. 11,652, 37 Fed Reg. 5209 (1972) (Nixon order); Exec. Order No. 10,501, 3 C.F.R. 292 (1971) (Eisenhower order); Exec. Order No. 10,985, 27 Fed. Reg. 439 (Jan. 12, 1962) (Kennedy order); Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 24, 1951) (Truman order).

Executive Order 13,526 issued by President Obama in December of 2009 (Obama order).[56] Yet, prior to President Obama's reexamination of Exemption 1's procedural and substantive framework, Executive Order 12,958, issued in 1995 by President Clinton and amended in 2003 by President Bush (jointly referred to as the Bush order), exclusively governed FOIA's national security classifications policy.[57] Although superseded by the Obama order,[58] the Bush order prescribed the manner in which many national security documents produced as a result of the government's involvement in the War on Terror were to be classified and withheld from public access. Under its language, if disclosure could be reasonably expected to endanger national security, then several enumerated categories of information were eligible for classification.[59]

The information categories identified as proper bases for classification in the Bush order were conceivably broad enough to encompass the detainee abuse photos. For example, executive-branch agencies could classify, and by extension withhold, information relating to, among other things, military plans and operations;[60] foreign government information;[61] intelligence activities (including special activities), sources, and methods;[62] and foreign relations or foreign activities, including confidential sources.[63] Undeniably, the images these abuse photographs portray—depicting soldiers blindfolding, binding, and torturing naked detainees held internationally[64]—related, in some degree, to all the aforementioned categories. Despite Exemption 1's unequivocal application to bar the release of the detainee abuse photographs, the government failed to invoke its protections when the ACLU demanded the photos' release in 2003.[65]

To many, the government's disregard for Exemption 1 was not unexpected; in fact, it was viewed to be quite rational. The Bush order prohibited the classification of information for national security purposes if, by doing so, such classification "conceal[ed] violations of

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56. Gidiere & Forrester, *supra* note 47, at 141.

57. Exec. Order No. 13,292, 3 C.F.R. 198.

58. *See* Exec. Order. No. 13,526, § 6.2(g), 75 Fed. Reg. 707 ("Executive Order 12958 of April 17, 1995, and amendments thereto, including Executive Order 13292 of March 25, 2003, are hereby revoked as of [180 days from December 29, 2009].").

59. *See generally* Exec. Order No. 13,292, 75 Fed. Reg. 707.

60. *See id.* § 1.4(a).

61. *See id.* § 1.4(b).

62. *See id.* § 1.4(c).

63. *See id.* § 1.4(d).

64. *See, e.g.*, Richard A. Serrano, *Lindh Defense Team Offers Abuse List*, L.A. TIMES, Mar. 24, 2002, at A1 (detailing the treatment of John Walker Lindh, a detainee, by the military while in custody).

65. *See* ACLU v. Dep't of Def. (*ACLU II*), 543 F.3d 59, 72-74 (2d Cir. 2008), *vacated*, 139 S. Ct. 777 (2009) (mem.).

law, inefficiency, or administrative error" or "prevent[ed] embarrassment to a person, organization, or agency."[66] The government was forced to concede, and thereby abandon, its paradoxical position: the ACLU requested disclosure of the photos to reveal the government's violations of law, which would certainly lead to embarrassment; however, the government was expressly prohibited by executive order from invoking Exemption 1 to safeguard those interests.[67] Therefore, the government's decision to rely on other, more ambiguous, FOIA exemptions was not a question of strategy, but of inevitability.

In 2008, as a presidential hopeful, Barack Obama touted a less-secretive government.[68] Naturally then, when elected and sworn into office, he drew harsh criticism from open-government advocates when he embraced the Bush-era position to keep the detainee abuse photos secret.[69] Perhaps to silence the rattling critics, in December 2009, two months after signing into law the Protection National Security Documents Act of 2009, President Obama issued Executive Order 13,526 as an attempt to offset the effects of his previous decision.[70] Although reported to be a "sweeping overhaul" of the Exemption 1 classification system,[71] in terms of categorical classification, the Obama order is much of the same.[72] The types of information subject to classification, such as military plans and operations and intelligence activities, remain eligible for secrecy if properly classified.[73] Moreover, the government is still prohibited from classifying materials to cover up violations of law or to prevent embarrassment.[74] For those reasons, under both the Bush and Obama orders, Exemption 1 remains an unsuitable means by which to keep secret the images depicting overseas detainee abuse.

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66. *See* Exec. Order No. 13,292, §§ 1.7(a)(1)-(a)(2), 3 C.F.R. 196 (2003).

67. *See id.*

68. Charlie Savage, *Obama Curbs Secrecy of Classified Documents*, N.Y. TIMES, Dec. 29, 2009, http://www.nytimes.com/2009/12/30/us/politics/30secrets.html?_r=1&scp=1&sq=Obama%20Curbs%20Secrecy%20of%20Classified%20Documents&st=cse.

69. *See id. See also* discussion *infra* Part IV (discussing the Obama administration's change of course when it advocated for the enactment of the National Security Protected Documents Act of 2009).

70. *See* Exec. Order No. 13,526, § 6.2(g), 75 Fed. Reg. 707 (Dec. 29, 2009).

71. *See* Savage, *supra* note 68.

72. *Compare id.* (discussing President Obama's Executive Order as a "part of a sweeping overhaul of the executive branch's system for protecting classified national security information"), *with* Clyde Middleton, *Obama's EO on Classified Docs is not a "Sweeping Overhaul,"* EXAMINER, Jan. 3, 2010, http://www.examiner.com/conservative-in-philadelphia/obama-s-eo-on-classified-docs-is-not-a-sweeping-overhaul (opining that "[b]eyond creating more government jobs, the [Executive Order] is largely following form and substance to its predecessors").

73. *See* Exec. Order No. 13,526, § 1.7, 75 Fed. Reg. 707.

74. *See id.*

2. Exemptions 6 and 7(C): Personal Privacy Interests

Exemptions 6 and 7(C) of FOIA protect personal privacy interests in non-law enforcement records[75] and law enforcement records,[76] respectively. These parallel exemptions "recognize[] that an individual's right of privacy and the public's right to examine government-held information represent two vital societal and legal values."[77] Under either standard, when making a determination of whether disclosure would constitute an invasion of privacy, agencies must balance the public's interest in knowing against the privacy interest protected by the exemptions.[78]

On one side of the scale sits the public's interest, which must be "significant" and encompass only those interests that reflect FOIA's "core purpose," or that "shed[] light on an agency's performance of its statutory duties [through public scrutiny]."[79] This includes records that would inform the public of official misconduct, which the government concedes the detainee abuse photos reveal.[80] On the other side of the scale sits the asserted privacy interests at stake, i.e., that releasing the detainee abuse photos would identify the detainees and invade their personal privacy.[81] Notwithstanding these asserted interests, courts agree that the redaction of a record's identifying information may adequately prevent any infringement of privacy.[82] Although redactions "cannot eliminate all risks of identifiability," they can diminish the significance of the privacy interests set forth.[83] Accordingly, balancing both interests "can be made easier by simply removing the sensitive

75. 5 U.S.C § 552(b)(6) (2006).

76. 5 U.S.C. § 552(b)(7)(c).

77. Halstuk & Chamberlin, *supra* note 30, at 539.

78. *See* NARA v. Favish, 541 U.S. 157, 171 (2004) (holding that an agency must balance privacy interests of persons affected by disclosure against the public interest in disclosure). *See also* CITIZEN'S GUIDE ON FOIA, *supra* note 27, at 18.

79. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772-73 (1989) (citing Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976)).

80. *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." (citation omitted)).

81. ACLU v. Dep't of Def. (*ACLU II*), 543 F.3d 59, 84-85 (2d Cir. 2008), *vacated*, 139 S. Ct. 777 (2009) (mem.).

82. *See* U.S. Dep't of State v. Ray, 502 U.S. 164, 175-78 (1991) (finding that redaction was appropriate to safeguard personal privacy of Haitian nationals interviewed by the State Department in connection with their involuntary repatriation); *Rose*, 425 U.S. at 354-58, 381 (affirming the redaction of personal references and other identifying information in Air Force Academy disciplinary records).

83. *See Ray*, 502 U.S. at 176; *Rose*, 425 U.S. at 381-82.

material from the document by the process of redaction and then releasing the remainder of the document to the requester."[84]

3. Exemption 7(F): Endangerment to Life or Physical Safety

Exemption 7(F) specifically addresses exempting from disclosure law enforcement records that "could reasonably be expected to endanger the life or physical safety of any individual."[85] As a result, to rely on Exemption 7(F) to withhold information, the government must make two showings: (1) that the record was compiled for law enforcement purposes; and (2) that record, if released, could reasonably be expected to jeopardize an individual's safety.[86]

Records compiled to investigate a government employee's illegal conduct fall within the ambit of Exemption 7(F)'s "law enforcement purposes"-prong.[87] Yet, the second prong of 7(F)'s two-part test, whether the release of a record could be reasonably expected to endanger an individual's safety, proves more difficult to interpret. While courts have routinely legitimized the government's invocation of 7(F) to protect names and identifying information of those *connected* to law enforcement investigations, some courts have been reluctant to use the exemption as a blanket safety protection. That is to say, several district courts appear to have interpreted Exemption 7(F) to withhold information that could hypothetically endanger many unnamed individuals.[88] Conversely, the U.S. Court of Appeals for the Second Circuit has rejected this approach, finding that for an agency to employ 7(F) as a means by which to deny the release of government-held information, it cannot simply rely on a need to protect "some unspecified member of a group so vast as to encompass all United States troops, coalition forces, and civilians in Iraq and Afghanistan."[89] This Note more thoroughly discusses FOIA Exemption 7(F) as it relates to *ACLU v. Department of Defense*.

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84. FOX, *supra* note 49, at 351 (discussing *Rose*). For further discussion on Exemptions 6 and 7(C), and FOIA's privacy framework, in general, see Halstuk & Chamberlin, *supra* note 30, at 538-63.

85. 5 U.S.C § 552(b)(7) (2006).

86. *See id.*

87. *See* CITIZEN'S GUIDE ON FOIA, *supra* note 27, at 506-07.

88. *See id.* at 656-57.

89. ACLU v. Dep't of Def. (*ACLU II*), 543 F.3d 59, 71 (2d Cir. 2008), *vacated*, 139 S. Ct. 777 (2009) (mem.).

C. *A Presidential Model for Withholding Government Information*

As the previous sections intimate, FOIA exemptions are supposed to protect as little information as possible.[90] In line with that scheme, an agency's invocation of an exemption to deny access to requested materials is not mandatory, but discretionary.[91] Such discretion is reflective of presidential policy. With every new president, FOIA's model for openness changes. Thus, FOIA is oftentimes the subject of "political manipulation by administrations that are intent on limiting public access to government-held information."[92]

After the September 11th attacks, President Bush's Attorney General, John Ashcroft, set the tone for that administration's FOIA policy when he issued a directive to all the heads of federal agencies and departments notifying them that the Justice Department, the body responsible for defending against FOIA challenges, would defend all agency efforts to withhold information under FOIA if any "sound legal basis" existed for doing so.[93] Additionally, Ashcroft encouraged agency officials to withhold "sensitive but unclassified information," which under typical FOIA standards should have been disclosed.[94] In sharp contrast to President Clinton's policy, instructing agencies to release records—even when they qualified for exemption—unless it would cause "foreseeable harm" to the purposes for which the exemption was established, President Bush's guidelines, which "did not purport to change FOIA's dissemination substantively under the law," effectively shifted FOIA's presumption of openness back to a pre-FOIA "need-to-know" standard.[95]

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90. FOX, *supra* note 49, at 348.

91. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) (noting that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure."). *See also* Memorandum from Eric Holder, Att'y Gen. of the U.S., to the Heads of All Fed. Dep'ts & Agencies (Mar. 19, 2009) [hereinafter Holder Memorandum] (encouraging agencies to make discretionary disclosures), *available at* http://www.usdoj.gov/ag/foia-memo-march2009.pdf; Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter Obama FOIA Memorandum]; U.S. Dep't of Justice, *OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines—Creating a New Era of Open Government*, FOIA POST, Apr. 17, 2009, http://www.justice.gov/oip/foiapost/2009foiapost8.htm (providing guidance on making discretionary disclosures).

92. Vladeck, *supra* note 32, at 1790.

93. Memorandum from John Ashcroft, Att'y Gen. of the U.S., to the Heads of All Fed. Dep'ts & Agencies (Oct. 12, 2001) [hereinafter Ashcroft Memorandum], *available at* http://www.doi.gov/foia/foia.pdf. *See also* Wells, *supra* note 26, at 1196.

94. Ashcroft Memorandum, *supra* note 93.

95. Edward G. Gerard, Note, *Bush Administration Secrecy: An Empirical Study of Freedom of Information Act Disclosure*, 15 MEDIA L. & POL'Y 84, 84-85 (2005); Uhl, *supra* note 26, at 285.

Employing these latter measures, the Bush administration deflected public scrutiny and portrayed mainstream American media's cumulative accusations of detainee abuse overseas as premised on sheer "political animus and misinformation."[96] Executive agencies then used those denials as a "license" to deny access to information that prior administrations would have unquestionably released, causing "requesters [like the ACLU] to undertake litigation . . . to pry loose agency records that in the past would have been made public as a matter of routine."[97]

Through its exemption structure, FOIA's supporters in Congress sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence."[98] Rather than calibrating this scale in favor of "the fullest possible disclosure," as FOIA's statutory objective commands, after September 11th, the Bush administration became profoundly committed to secrecy and unremitting denials of wrongdoing.[99] Consequently, the government's impervious defense to the ACLU's request to release photos depicting torture and inhumane treatment of detainees was foreseeable. Fortunately for groups like the ACLU, when the government refuses to release requested records, a requester may then hale that body into court and ask the judiciary to determine whether an agency's denial achieved a suitable balance under FOIA.[100] In fact, it was this precise issue that governed the ultimate outcome of *ACLU v. Department of Defense*. Against this backdrop, this Note turns next to an extended discussion of that case.

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96. Kreimer, *supra* note 4, at 1194.

97. Vladeck, *supra* note 32, at 1790.

98. John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (citing H.R. REP. NO. 1497, at 6 (1966)). *See also* NARA v. Favish, 541 U.S. 157, 172 (2004) (observing that, while government information "belongs to citizens to do with as they choose" under FOIA, that notion is balanced against statutory "limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it").

99. S. REP. NO. 89-813, at 3 (1965), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423 (stating FOIA's statutory objective is achieving "the fullest possible disclosure"). *See also* Dep't of Def. v. FLRB, 510 U.S. 487, 494 (1994) (reiterating that FOIA reflects a general philosophy of full agency disclosure); Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 754 (1989) (noting that the "statute known as the FOIA" is founded upon a general philosophy of full agency disclosure).

100. *See* 5 U.S.C. § 552(a)(4)(B) (2006). *See also* Halstuk & Chamberlin, *supra* note 30, at 513.

III. THE FIGHT TO RELEASE THE DETAINEE ABUSE PHOTOS: *ACLU V. DEPARTMENT OF DEFENSE*

A. *The U.S. District Court*

"After 9/11 the gloves [admittedly] come off."[101] Responding to the attacks, President Bush unofficially authorized the CIA to kidnap and employ secret coercive interrogation techniques to pursue terrorists.[102] Under this policy, "suspects were 'rendered' to countries where they could be tortured, and the CIA began to establish a network of 'black sites' where 'no holds barred' interrogation could proceed without interference."[103] While detained, prisoners were subjugated to "stress positions" for hours at a time, denied "non-emergent" medical care, deprived "of high and low auditory stimuli," hooded, forced to remove clothing, and subjected to fearsome dogs "to induce stress."[104] Undeterred by the Bush administration's efforts to keep "hard confirmations" of abuse hidden, widespread news detailing the abusive treatment, and sometimes death, of detainees held internationally began to proliferate.[105]

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101. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1 (quoting a statement made by Cofer Black, then-head of the CIA Counterterrorist Center, at a September 2002 joint hearing of the House and Senate intelligence committees).

102. *See* Kreimer, *supra* note 4, at 1189 (citing several news articles describing such action).

103. *Id.*

104. Memorandum from James T. Hill, Gen., U.S. Army, to Chairman of the Joint Chiefs of Staff on Counter-Resistance Techniques (Oct. 25, 2002), *reprinted in* MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 167, 179 (2004).

105. *See, e.g.*, Priest & Gellman, *supra* note 101 ("The alleged terrorists are commonly blindfolded and thrown into walls, bound in painful positions, subject to loud noises and deprived of sleep."); Gall, *supra* note 5, at A14 ("Two former prisoners [at Bagram] . . . said the conditions to which they themselves were subjected at the time included standing naked, hooded and shackled, being kept immobile for long periods and being deprived of sleep for days on end."); Tom Brune, *An Aggressive Interrogation*, NEWSDAY, Mar. 3, 2003, at A5 (quoting Vincent Cannistraro, a former director of the CIA's Counterterrorism Center, describing the treatment of a Guantanamo Bay detainee who was sent to Egypt for "failing to cooperate" and then had his fingernails torn out, after which "he started telling things"); Barbara Starr, *Afghan Detainees' Deaths Ruled Homicides*, CNN.COM, Mar. 5, 2003, http://www.cnn.com/2003/US/03/05/detainee.homicides/index.html (noting that the "criminal investigation" into the deaths of two Afghan detainees was in its final stages, and relating the acknowledgment of one senior military official that "[t]his investigation may not go well for us"); Kaplan et al., *supra* note 7, at 18 ("The CIA has helped move dozens of detainees not only to Jordan but also to Egypt, Morocco, and even Syria."); April Witt, *U.S. Probes Death of Prisoner in Afghanistan*, WASH. POST, June 24, 2003, at A18 (reporting the death of an Afghan man held at a U.S. holding facility near Asadabad, in the eastern province of Konar, Afghanistan). *See also* Kreimer, *supra* note 4, at 1194.

Prompted by these outrageous revelations and the Bush administration's routine failure to address credible reports recounting torture and rendition of detainees, in October 2003, pursuant to Section 552(a)(3) of FOIA, the ACLU[106] filed joint requests with the Department of Defense and the Department of the Army (collectively referred to as the government) seeking access to records believed to document such conduct.[107] Citing several news reports and complaints of abuse, the ACLU's requests specifically sought records concerning the enforcement of "policies, procedures or guidelines" authorizing the abuse of prisoners in U.S. custody as a means by which to assess the executive branch's abidance with domestic and international law.[108] Despite the ACLU's timely requests, however, the government neglected to respond.[109]

Meanwhile, the seemingly infinite supply of written reports uncovering detainee abuse exhibited no signs of subsiding. To the contrary, in April 2004, news broke that, in January, Army Specialist Joseph Darby, a military policeman stationed at Abu Ghraib, submitted a complaint to report wrongdoing to the Army's Criminal Investigation Command (Army CID).[110] The complaint included a compact disc filled with pictures.[111] Stories further explained that General Ricardo Sanchez,

106. Several other advocacy groups later joined the ACLU in requesting information from these executive branch agencies, including the Center for Constitutional Rights, the Physicians for Human Rights, the Veterans for Common Sense, and the Veterans for Peace. *See* ACLU v. Dep't of Def. (*ACLU II*), 543 F.3d 59, 59 (2d Cir. 2008), *vacated*, 139 S. Ct. 777 (2009) (mem.).

107. *See* ACLU FOIA Request, *supra* note 14; *ACLU II*, 543 F.3d at 64. In fact, the ACLU, becoming Respondents after the Department appealed the Second Circuit's opinion to the U.S. Supreme Court, asserted that this case arose "after news organizations reported that prisoners held by the Department of Defense and Central Intelligence Agency had been abused, tortured, and in some cases killed in custody." Supplemental Brief for Respondents at *1, Dep't of Def. v. ACLU (*ACLU III*), 130 S. Ct. 777 (2009) (No. 09-160), 2009 WL 4030675.

108. *See* ACLU FOIA Request, *supra* note 14. Additionally, the ACLU's FOIA request made clear that "[b]oth international (Geneva Conventions) and United States law unequivocally prohibit the use of torture." *Id.* The request further stated that "[t]he Convention Against Torture ("CAT"), [,] [codified at 18 U.S.C. § 2340A (2006),] which the United States has signed and ratified, prohibits the use of torture and the infliction of other cruel, inhuman or degrading treatment or punishment." *Id.*

109. *ACLU II*, 543 F.3d at 64.

110. Seymour M. Hersh, *The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib*, NEW YORKER, May 24, 2004, at 43, *available at* http://www.newyorker.com/archive/2004/05/24/040524fa_fact?printable=true.

111. *Id.*

> The abuses at Abu Ghraib were exposed on January 13th, when Joseph Darby, a young military policeman assigned to Abu Ghraib, reported the wrongdoing to the Army's Criminal Investigations Division. He also turned over a CD full of photographs. Within three days, a report made its way to Donald Rumsfeld, who informed President Bush.

the commander of coalition forces in Iraq, responded to the complaint by appointing General Antonio Taguba to investigate prisoner abuse at Abu Ghraib.[112] Once completed, General Teguba's investigation revealed "both the 'sadistic, blatant and wanton' prisoner abuse by guards and apparent collusion and acquiescence by officers."[113] Then, on the evening of April 28, 2004, 60 Minutes II aired the story in its entirety along with some of the graphic images that depicted U.S. soldiers "forc[ing] detainees, often unclothed, to pose in dehumanizing, sexually suggestive ways," or in "stress positions," while being "threatened with dogs."[114] Finally, the government's dissimulation over detainee abuse abroad had begun to falter.[115]

Incited by the photos' release and having received no records in response to its previous FOIA requests, the ACLU renewed its campaign by filing a complaint in the U.S. District Court for the Southern District of New York to seek the immediate release of the requested information.[116] Two months later, to assist the government with locating all relevant documentation, the court directed the ACLU to provide each department with a list of records it "claimed were responsive to the FOIA requests."[117] Among the records listed, the ACLU identified a series of photographs and videos, including, in particular, the pictures provided to the Army CID by Army Specialist Darby eight months before (the Abu Ghraib abuse photos).[118] Similar to

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Id.

112. ANTONIO M. TAGUBA, U.S. DEP'T OF DEF., ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 6 (2004) [hereinafter TAGUBA REPORT], *available at* http://www.npr.org/iraq/2004/prison_abuse_report. pdf.

113. Kreimer, *supra* note 4, at 1198-99 (quoting TAGUBA REPORT, *supra* note 112, at 14-20).

114. *60 Minutes II: Abuse of Iraqi POWs by GIs Probed*, *supra* note 9; *ACLU II*, 543 F.3d at 64; Brief in Opposition at *2, Dep't of Def. v. ACLU (*ACLU III*), 130 S. Ct. 777 (2009) (No. 09-160), 2009 WL 2918994.

115. Here, it is worth mentioning that "[t]he frequency of violent incidents in Iraq in 2004 was actually higher in the first weeks of April than in the 14 weeks after the Abu Ghraib scandal broke April 28 when photos were aired on '60 Minutes II' and were later posted online by *The New Yorker* magazine." Brief for the Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Respondents, *supra* note 3, at 11 n.8 (citation omitted). Also, "U.S. troop deaths from enemy fire were also much higher before the photos appeared in public: 126 in April 2004 compared with 63 in May and 37 in June 2004." *Id.* (citation omitted). Given these numbers, the government's argument that "the photos in this case w[ould] call for instant anti-U.S. retaliation" appears to be misplaced. *Id.* at 10.

116. *ACLU II*, 543 F.3d at 64.

117. *Id.*; Petition for Writ of Certiorari at *2, *ACLU III*, 130 S. Ct. 777 (No. 09-160), 2009 WL 2430236.

118. *See* Petition for Writ of Certiorari, *supra* note 117, at *2; *ACLU II*, 543 F.3d at 65. Part of seven investigative files of the Army's CID, the requested photos "were provided to Army CID in connection with allegations of mistreatment of detainees. In three of the investigations, Army CID found probable cause to believe detainee abuse had occurred related

those aired by 60 Minutes II, these photographs were said to contain graphic images depicting abuse of prisoners detained at U.S. detention facilities, like the Abu Ghraib prison, in Iraq and Afghanistan.[119] In spite of the ACLU's detailed requests, the government maintained its pattern of noncompliance.[120]

The government countered the ACLU's requests by employing several FOIA exemptions.[121] For example, in its motion for summary judgment, the government initially invoked FOIA Exemptions 6 and 7(C) as support for withholding the detainee abuse photographs.[122] Because both "provisions authorize the withholding [of records] where disclosure would constitute an 'unwarranted invasion of personal privacy,'" the government reasoned, applying the exemptions to this factual scenario was essential "to protect the privacy interests of the detainees depicted in [the photographs]."[123] However, in its own cross-motion for summary judgment, the ACLU defended against the government's assertions, explaining that redactions to obscure identifying features of those depicted in the photos "could eliminate any unwarranted invasions of privacy."[124]

After more than two months of motion practice, the government supplemented its original argument by adding another justification for withholding the photographs: FOIA Exemption 7(F).[125] Authorizing the "withholding of records 'compiled for law enforcement purposes' where disclosure 'could reasonably be expected to endanger the life or physical safety of *any individual*,'" Exemption 7(F), the government contended, was applicable here to protect the "life or physical safety of United States troops, other Coalition forces, and civilians in Iraq and Afghanistan."[126] In other words, a release of these photos, as the government so framed its argument, could reasonably be expected to endanger the life or physical safety of countless, unnamed individuals overseas.[127] Interestingly, the government further averred that these concerns related to national security, yet failed to invoke Exemption 1, which is FOIA's only national security exemption.[128]

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to the photographs at issue here." *ACLU II*, 543 F.3d at 65. In fact, "[s]oldiers under scrutiny in two of the investigations ha[d] been punished under the Uniform Code of Military Justice." *Id.*

119. *ACLU II*, 543 F.3d at 64-65.

120. *See id.* at 64.

121. *Id.*

122. *Id.*

123. *Id.* (alteration in original).

124. *Id.*

125. *Id.*

126. *Id.* (quoting 5 U.S.C. § 552(b)(7)(F) (2006)) (emphasis added).

127. *Id.*

128. Brief in Opposition, *supra* note 114, at *2-*3. "[O]ne might have expected that the administration would claim the right to withhold documents on the basis of national security

To support its Exemption 7(F) argument, the government submitted to the court a declaration authored by General Richard Myers, who, at the time, was Chairman of the Joint Chiefs of Staff and the nation's highest ranking military officer.[129] In his declaration, General Myers expressed concern that "the government's public disclosure of the photographs would pose a 'grave risk of inciting violence and riots[] against American and allied military personnel and would expose innocent civilians to harm."[130] His apprehension was based, by and large, on

> his extensive military experience, assessments by his combat commanders, intelligence reports from subject-matter experts, the violent response to the release of photographs of detainees in British custody, and the widespread and deadly rioting following the publication of a false story alleging desecration of detainees' copies of the Koran at Guantanamo Bay, Cuba.[131]

Despite acknowledging the "risk that the enemy [could] seize upon the publicity of the photographs and seek to use such publicity as a pretext for enlistments and violent acts," the district court, nevertheless, found General Myers' well-reasoned concerns unpersuasive.[132]

On September 29, 2005, nearly two years after the ACLU filed its joint FOIA requests, the district court held in the ACLU's favor and ordered the prompt release of the Abu Ghraib abuse photos.[133] In so holding, the court first addressed the government's privacy argument, determining that the redaction of "all identifying characteristics of the persons in the photographs" would prevent any invasion of privacy

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under FOIA Exemption 1 . . . . The administration had, after all, classified the Teguba report and threatened to prosecute those who had leaked it, and it could rely on precedent according 'special deference' to the government's expertise regarding national security. But no such claims were raised." Kreimer, *supra* note 4, at 1204. In fact, the Teguba report and its contents were subsequently unclassified. *Id.* at 1204-05. Exemption 1 may only be used where government officials can certify that material is properly classified. *Id.* at 1205. Here, it appeared at least "[o]n the surface . . . that the classification was used to conceal violations of law which is specifically prohibited." *Id.* at 1204 (citing Paul Shukovsky, *U.S. Moves to classify Abuse Suit Documents*, SEATTLE POST-INTELLIGENCER, June 24, 2004, at A1.

129. Petitioner for Writ of Certiorari, *supra* note 117, at *3.

130. *Id.* at 4.

131. *Id.*

132. *ACLU II*, 543 F.3d at 65.

133. *Id.* at 64. Notably, "by the end of 2006 the New York litigation had resulted in the release of over 100,000 pages of documents," including redacted portions of the Teguba report, "FBI memoranda documenting both military interrogation abuses and the FBI's tabled objections to them," and "a tide of other evidence of abusive policies." Kreimer, *supra* note 4, at 1205-06.

interests.[134] Likewise, even if an invasion of privacy were to occur in spite of the redactions, the court reasoned, "such an invasion would not be 'unwarranted' since the public interest [in accountability] 'far outweigh[ed] any speculative invasion of privacy.' "[135] Turning next to the government's "eleventh-hour," Exemption-7(F) argument, the district court rejected its position and concluded that "the core values . . . Exemption 7(F) was designed to protect [were] not implicated by the release of the [Abu Ghraib] photographs, but . . . the core values of FOIA [were] very much implicated."[136] Significantly, the court expressly declined to address whether the Exemption's protection of "any individual" could extend to countless, unnamed persons, as the government so alleged.[137] Apart from that absent consideration, the court ordered the photos to be released in redacted form to protect FOIA's "core values" and to foster "education and debate."[138]

Determined to keep the photographs hidden, the government appealed the district court's order.[139] However, in March of 2006, while the appeal was pending, the online publication Salon.com, an independent third party, published many of the Abu Ghraib photos at issue on the Internet. As a consequence, the government withdrew its appeal.[140] Yet, in contrast to what the government had feared, "[t]he release of the photographs had no discernable effect on the welfare of American forces at home or abroad, nor . . . on the [ACLU's] quest for accountability."[141] Additionally, although many Abu Ghraib abuse photos were inadvertently released, several other detainee abuse images, some of which were reported to depict rape, sexual abuse, and gun pointing by soldiers at the heads of hooded and bound detainees, had yet to be published.[142]

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134. ACLU v. Dep't of Def. (*ACLU I*), 389 F. Supp. 2d 547, 571 (S.D.N.Y. 2005), *aff'd*, 543 F.3d 59 (2d Cir. 2008), *vacated*, 130 S. Ct. 777 (2009) (mem.).

135. *ACLU II*, 543 F.3d at 64 (quoting *ACLU I*, 389 F. Supp. 2d at 572-73).

136. *ACLU I*, 389 F. Supp. 2d at 578.

137. *ACLU II*, 543 F.3d at 64. As the Second Circuit explained, "[t]he district court explicitly declined to resolve the parties' dispute regarding the proper construction of the phrase 'any individual' in [E]xemption 7(F)." *Id.* at 67 (citing *ACLU I*, 389 F. Supp. 2d at 578).

138. *ACLU I*, 389 F. Supp. 2d at 578.

139. *ACLU II*, 543 F.3d at 65.

140. *See id.*; Editorial, *The Abu Ghraib Files*, SALON.COM, Mar. 14, 2006, http://www.salon.com/news.abu_ghraib/2006/03/14/introduction. After the Abu Ghraib photos' unexpected release, in addition to abandoning its appeal, the government subsequently authenticated the validity of the photos in April 2006. *See* Josh White, *Government Authenticates Photos from Abu Ghraib*, WASH. POST, Apr. 11, 2006, at A16.

141. Kreimer, *supra* note 4, at 1208.

142. *ACLU II*, 543 F.3d at 65; *see* Duncan Gardham & Paul Cruickshank, *Abu Ghraib Abuse Photos 'Show Rape,'* TELEGRAPH (U.K.), May 27, 2009, http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5395830/Abu-Ghraib-abuse-photos-show-rape.html; Jason Leopold, *Gates Invokes New Authority to Block Release of Detainee Abuse Photos*,

The ACLU pursued disclosure by seeking clarification from the government regarding the yet-to-be-released abuse images.[143] Invoking for a second time Exemptions 6, 7(C), and 7(F), the government confirmed that it was, in fact, withholding twenty-nine additional photographs.[144] The government maintained that the additional photos depicted detainees who "were clothed and generally not forced to pose," and as such, were not responsive to the ACLU's original FOIA requests.[145] Following an expedited procedure to resolve this issue, the district court again ordered the government to release, in redacted form, twenty-one of the twenty-nine disputed photos (collectively referred to as the "unpublished detainee abuse photos").[146] Because the government's "basis for withholding the [twenty-nine additional] photographs had been the same as their basis for withholding the Abu Ghraib photos, the district court adopted the reasoning of the Abu Ghraib order" referenced above.[147]

Subsequently, the government appealed the district court's final order to the U.S. Court of Appeals for the Second Circuit.[148] Unlike the leaked photos that forced the government to withdraw its prior appeal, on this occasion, no barriers to appellate review existed.[149] The sole issue on appeal was whether the lower court properly ordered the release of the twenty-one photos, which were said to depict further detainee abuse and mistreatment.[150] Ultimately, in a unanimous opinion authored by Judge John Gleeson, the Second Circuit panel affirmed the district court's final order requiring the government to release the

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ANTEMEDIUS, Nov. 15, 2009, http://www.antemedius.com/content/gates-invokes-new-authority-block-release-detainee-abuse-photos.

> [T]he photographs at issue include one in which a female soldier is pointing a broom at a detainee "as if [she were] sticking the end of the broomstick into [his] rectum." Other photos are said to show US soldiers pointing guns at the heads of hooded and bound detainees in prisons in Iraq and Afghanistan.

Id.; Massimo Calabresi & Michael Weisskopf, *The Fall of Greg Craig Obama's Top Lawyer*, TIME, Nov. 30, 2009, at 34 ("The images included those of U.S. soldiers pointing guns at one detainee's head and a broomstick at the backside of another."), *available at* http://www.time.com/time/magazine/0,9263,7601091130,00.html.

143. *ACLU II*, 543 F.3d at 65.

144. *Id.*

145. *See id.*

146. *Id.* All but one of the unpublished abuse photos the district court ordered to be released were in redacted form. *See id.*

147. *Id.*

148. *Id.*

149. *See id.*

150. *See id.* In defending the lower court's order, the ACLU neither contested its mandate to withhold eight of the unpublished photos nor its decision to redact the photos the court ordered to be released. *Id.*

unpublished detainee abuse photos.[151]

B. *The U.S. Court of Appeals*

Perhaps it came as no surprise that the government's "lead argument" on appeal to the Second Circuit (and only argument on appeal to the U.S. Supreme Court) relied principally on FOIA Exemption 7(F).[152] Dividing 7(F) into three distinct elements, the government set forth its argument as follows:

> (a) the [unpublished] Army [abuse] photos, which were gathered during Army CID investigations, are documents "compiled for law enforcement purposes" within the meaning of [FOIA]; (b) disclosure of the photos could reasonably be expected to incite violence against United States troops, other Coalition forces, and civilians in Iraq and Afghanistan; and (c) since there is no limit to who is protected by [E]xemption 7(F) [because it expressly applies to "any individual"], withholding is warranted.[153]

The Second Circuit then examined each element in turn. As to the first element, the circuit court agreed with the government; the unpublished detainee abuse photos were unequivocally collected to prosecute soldiers responsible for detainee abuse, and as such, were compiled for law enforcement purposes.[154] With respect to the second element, the circuit court accepted, without deciding upon, the government's assertion that "the photographs would reasonably be expected to incite violence against United States troops, other Coalitions forces, and civilians in Iraq and Afghanistan."[155] When the appeals court reached

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151. *Id.* at 91.

152. *Id.* at 66; *see* Petition for Writ of Certiorari, *supra* note 117, at *I (requesting the U.S. Supreme Court only to resolve Exemption 7(F)). The question presented is

> [w]hether Exemption 7(F) exempts from mandatory disclosure photographic records concerning allegations of abuse and mistreatment of detainees in United States custody when the government has demonstrated that the disclosure of those photographs could reasonably be expected to endanger the lives or physical safety of United States military and civilian personnel in Iraq and Afghanistan.

Id. Thus, the government implicitly dropped the alternative arguments it previously argued in the Second Circuit Court of Appeals.

153. *ACLU II*, 543 F.3d at 67 (quoting 5 U.S.C. § 552(b)(7)(F)).

154. *Id.* at 65, 67 (explaining that the photos were part of the Army CID's investigative files and were provided to the Army CID in connection with allegations of mistreatment of detainees by U.S. soldiers).

155. *Id.* at 67 n.3.

the government's third and final elemental proposition—to whom the exemption applied—it became the main source of contention.[156]

On this issue, the government averred:

> "[A]ny individual" in [E]xemption 7(F) must, due to the brute force of the word "any," be interpreted to extend its protection to all persons, whether or not they can be identified, no matter how remote they are from the law enforcement investigation in which the disputed records were complied, and no matter how small the risk to any particular individual . . . .[157]

Unsatisfied with this explanation, the Second Circuit rejected the government's argument for two central reasons.[158] First, given FOIA's context and the exemption's legislative history, "both of which contemplate a far narrower role for [E]xemption 7(F) than that envisioned by [the government]," to invoke its protections "an agency *must identify at least one individual with reasonable specificity* and establish that disclosure of the document could reasonably be expected to endanger that person."[159] Here, the government no more than speculated that "someone somewhere" could be endangered by disclosure.[160]

Second, and possibly more persuasively, the appellate court reasoned that to apply Exemption 7(F) to national security concerns would seriously undercut the existence of separate standards under FOIA Exemption 1, which already protects against those concerns.[161] As the appellate court professed:

> It would be anomalous if an agency that could not meet the requirements for classification of national security material could, by characterizing the material as having been compiled for law enforcement purposes, evade the strictures and safeguards of classification and find shelter in [E]xemption 7(F) simply by asserting that disclosure could reasonably be expected to

156. *See id.* at 66-83 (discussing FOIA Exemption 7(F)'s statutory language, its structure in relation to other FOIA exemptions, its legislative history, and finally, its subsequent application).

157. *Id.* at 69.

158. *See* Michael C. Dorf, *A Supreme Court Ruling Means Prisoner Abuse Photos Stay Secret*, FINDLAW.COM, Dec. 2, 2009, http://writ.news.findlaw.com/dorf/20091202.html (recognizing "two main reasons" for the Second Circuit's disavowal of the government's interpretation of FOIA Exemption 7(F)).

159. *ACLU II*, 543 F.3d at 71 (emphasis added).

160. *Id.*

161. *See id.* at 72-74; *see also* Dorf, *supra* note 158.

endanger someone unidentified somewhere in the world.[162]

Stated differently, because agencies could not invoke Exemption 1 to conceal violations of law or prevent agency embarrassment regarding national security, allowing the invocation of 7(F) to do so would be contradictory and "far more favorable to secrecy."[163] Accordingly, to dispel the government's attempts to "reinvent [E]xemption 7(F) as an all-purpose damper on global controversy," in September 2008, the Second Circuit affirmed the district court's order instructing the government to release the remaining unpublished detainee abuse photographs.[164] The government's subsequent motion for rehearing en banc was denied on March 11, 2009.[165]

C. *A Presidential Flip-Flop and Another Appeal*

In April 2009, constrained by recent appeals, the newly appointed Obama administration had but one option: pick up the pieces the Bush administration's contentious, dragnet policies left behind. It began picking up those pieces just one month before when President Obama's Attorney General, Eric Holder, issued a directive to the heads of all executive agencies calling for a "presumption of openness" and overturning the "Ashcroft doctrine" of the Bush administration that allowed the government to withhold information requested through FOIA whenever legally possible.[166] Now, at the FOIA litigation's dénouement, the nation could finally appraise President Obama's campaign-driven pronouncements for governmental transparency. Faced with either producing the unpublished detainee abuse photos or seeking an appeal with the U.S. Supreme Court, the Obama administration initially decided to abide by the Second Circuit's holding.[167] Three weeks later, the administration changed its tune.[168]

In a speech delivered on May 21, 2009, President Obama reversed his earlier commitment to release the torture photos, citing "a clear and compelling reason" reminiscent of the Bush-administration

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162. *ACLU II*, 543 F.3d at 73.

163. *Id.*

164. *Id.* at 80, 91.

165. Ann Scott Tyson, *Pentagon to Release Prisoner Abuse Photos*, WASH. POST, Apr. 25, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/24/AR2009042401516.html.

166. Holder Memorandum, *supra* note 91.

167. *Id.* For example, President Obama's Defense Secretary, Robert M. Gates "said it was 'unrealistic' for the government to try to keep the photos of detainee abuse a secret, noting that the ACLU lawsuit and others like it have made public release practically unavoidable." Tyson, *supra* note 165.

168. *See* Baumann, *supra* note 26.

philosophy.[169] That reason: "[R]eleasing these photos would inflame anti-American opinion and allow our enemies to paint U.S. troops with a broad, damning, and inaccurate brush, thereby endangering them in theaters of war."[170] Ironically, reaffirmations of President Obama's commitment to transparency pervaded his entire address.[171] Contemporaneously, President Obama authorized his administration to appeal *ACLU v. Department of Defense* to the U.S. Supreme Court and file a motion with the Second Circuit Court of Appeals requesting to keep the photos secret until the appellate process concluded.[172] The Second Circuit granted the government's motion, but before the Supreme Court could resolve the issue, Congress passed the Protected National Security Documents Act of 2009 (Protected Documents Act or the Act), effectively superseding the Second Circuit's previous decision and any subsequent opinion that could be issued.[173] Consequently, the Supreme Court asked the lower court to reconsider the issue in light of the Act's passage.[174]

IV. LEGISLATIVE OVERRIDE: THE PROTECTED NATIONAL SECURITY DOCUMENTS ACT OF 2009

Months before the Protected Documents Act's enactment, Justice Department lawyers informed the ACLU in a letter that the government planned to release the unpublished abuse photos along with a "substantial number" of other images.[175] By May 2009, however, the Obama administration had changed its course and decided to contest the appellate court's decision.[176] Then, in the month that followed, perhaps due to apprehension regarding the strength of its argument at the Supreme Court level, the administration decided to pursue a "legislative workaround" by pushing for the enactment of the Protected Documents Act.[177]

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169. Obama Remarks, *supra* note 18.

170. *Id.*

171. *See id.*

172. Calabresi & Weisskopf, *supra* note 142, at 34.

173. *See* Dorf, *supra* note 158.

174. Dep't of Def. v. ACLU (*ACLU III*), 130 S. Ct. 777 (2009) (mem.).

175. Letter from Lev L. Dassin, Acting U.S. Att'y, to Hon. Alvin K. Hellerstein, U.S. Dist. Court Judge, and copied to Amrit Singh, ACLU (Apr. 23, 2009), *available at* http://www.aclu.org/files/pdfs/safefree/letter_singh_20090423.pdf.

176. Jeff Zeleny & Tom Shanker, *Obama Moves to Bar Release of Detainee Abuse Photos*, N.Y. TIMES, May 13, 2009, *available at* http://www.nytimes.com/2009/05/14/us/politics/14photos.html.

177. Baumann, *supra* note 26.

A. *The Power to Suppress Evidence of Its Own Misconduct*

Spearheaded by Senator Joseph Lieberman of Connecticut, the very pith and purpose behind the Protected Documents Act was to invalidate the Second Circuit's ruling.[178] Because the appeals court determined that, under FOIA's existing exemption structure, the unpublished detainee abuse photos could not be withheld, "the Obama administration simply asked Congress to carve out a new exemption."[179] Obliging the president's request, Congress amended the Department of Homeland Security Appropriations Act of 2010 by adding Section 565, the Protected Documents Act, to its text. Congress approved the entire bill, including Section 565, and President Obama subsequently signed it into law on October 28, 2009.[180] As enacted, the Protected Documents Act allows the Defense Department to exempt from FOIA disclosure any "protected document," which encompasses "photographs, negatives, digital images, films, video tapes, and motion pictures," that was

> taken during the period beginning on September 11, 2001, through January 22, 2009 . . . relat[ing] to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States . . . [if] the Secretary of Defense determines [upon certification] that disclosure of that photograph would endanger citizens of the United States Armed Forces, or employees of the United States Government deployed outside of the United States.[181]

By virtue, the Act vests the Defense Department with power to suppress evidence of its own misconduct.

Within weeks, Secretary of Defense Robert Gates, after conferring with the Chairman of the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander of Multi-National Forces-Iraq, exercised his new certification authority under the Protected Documents Act and blocked the release of the unpublished detainee abuse photos that were the subject of the foregoing FOIA litigation.[182] Accordingly,

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178. *Id.*

179. *Id.*

180. *See* Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, 123 Stat. 2142 (Oct. 28, 2009); Protected National Security Documents Act of 2009, § 565, 123 Stat. at 2184-85.

181. Protected National Security Documents Act of 2009, §§ 565(c)(1)-(d)(1).

182. Leopold, *supra* note 142 (certification is reproduced as Appendix B in the government's supplemental brief before the U.S. Supreme Court).

in a one-paragraph, unsigned order, the U.S. Supreme Court vacated the Second Circuit's opinion and remanded the case for reconsideration in light of the Act's passage.[183] Undoing the ACLU's years-long battle over the photos' release, the Protected Documents Act and the Supreme Court's implicit acceptance of its mandate wield far greater implications for FOIA's future and its ability to effectively hold the government accountable during this nation's continued involvement in the War on Terror.[184]

B. *A Backdoor Exemption Without Attendant FOIA Safeguards*

The month he took office, President Obama announced to the American public that transparency would be a "touchstone[] of [his] presidency."[185] For several reasons, however, the Protected Documents Act has cast immeasurable doubt on the President's bold proclamation. And while FOIA potentially remains a critical tool by which to ensure public accountability, freedom of information is not a constitutional guarantee, but a statutory right perpetually vulnerable to legislative revision. Thus, when the executive branch realized that no FOIA exemptions could be legitimately invoked to keep the unpublished detainee abuse photos secret, it called upon Congress to create a new, backdoor exemption. Yet, in crafting the Protected Documents Act's statutory framework, Congress dispensed with FOIA's traditional balance between the right of the public to know and the need of the government to keep information in confidence. Given the clarity with which FOIA operates, the government's new exception now threatens to swallow the very rules FOIA has perennially espoused.

1. Expansive Scope

First, in terms of scope, the Protected Documents Act is quite expansive. It authorizes the Defense Secretary to withhold documents he determines to be "protected."[186] That is, the Defense Secretary can theoretically withhold any "still photographs, negatives, digital images, films, video tapes, and motion pictures" relating to "to the treatment of

183. Dep't of Def. v. ACLU (*ACLU III*), 130. S. Ct. 777 (2009).

184. It should be noted that it is also unlikely that the ACLU has a valid First Amendment claim against the Protected National Security Documents Act. In the past, the U.S. Supreme Court has recognized that "[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978). In other words, "the First Amendment restricts the ability of government to censor the private dissemination of information, but it does not require that the government disclose information that it possesses." Dorf, *supra* note 158.

185. Obama FOIA Memorandum, *supra* note 91.

186. Protected National Security Documents Act of 2009, § 565(b)(1)(A).

individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States."[187] Given its breadth, the Protected Documents Act not only applies to the unpublished detainee abuse photos at which the Act was aimed, but quite possibly to over 2,000 other photos alleged to document the government's jarring acquiescence of international law violations.[188] For example, the Act's coverage may extend to "video footage of aerial attacks that resulted in civilian causalities or photos showing the conditions of confinement at the Bagram detention center in Afghanistan."[189] In fact, a Pentagon spokesman relayed that Defense Secretary Gate's certification "cover[ed] *all* photographs from investigations related to the treatment of individuals captured or detained in military operations outside the United States between Sept. 11, 2001, and Jan. 22, 2009."[190] Unfortunately, this news does not bode well for the ACLU's April 2009 FOIA request for records relating to the detention and treatment of prisoners held at Bagram, which some critics dub as "Guantanamo Two."[191]

2. Lax Asserted-Harm Requirement

Second, pursuant to the Protected Documents Act's statutory framework, the withholding of these documents is understood to protect danger to "citizens of the United States, members of the United States Armed Forces, or employees of the U.S. Government deployed outside the United States."[192] It is difficult to imagine a group not included by this language. Whereas the Second Circuit's narrow interpretation of Exemption 7(F) reaffirmed that the government could not justify withholding further detainee abuse photos to protect countless unnamed individuals, the Protected Documents Act permits the Defense Secretary to do just that.[193] Namely, to implement the Act's protections, the

187. *Id.* at §§ 565(b)-(c)(2).

188. *See* Baumann, *supra* note 26 (relaying that some reports indicate that the Protected Documents Act could potentially apply to block over 2,000 photos).

189. Jameel Jaffer, Opinion, *Detainee-abuse Photos and Democracy*, L.A. TIMES, Oct. 20, 2009, at 19, *available at* http://articles.latimes.com/2009/oct/20/opinion/oe-jaffer20.

190. Stephen Ohlemacher, *Gates Blocks Release of Detainee Abuse Photos*, SEATTLE TIMES, Nov. 14, 2009, http://seattletimes.nwsource.com/html/politics/2010276424_apusabuse photos.html.

191. Saeed Shah, *With New Bagram Prison, U.S. Looks to Put Bad Press of Years Past to Rest*, STAR & STRIPES, Feb. 25, 2010, http://www.Stripes.com/news/with-new-bagram-prison-u-s-looks-to-put-bad-press-of-years-past-to-rest-1.99509. *See* William Fisher, *Habeas Challenges for Bagram Prisoners*, Mar. 3, 2010, COUNTERCURRENTS.ORG, http://countercurrents.org/fisher030310.htm.

192. Protected National Security Documents Act of 2009, § 565(c)(1)(A).

193. *See* ACLU v. Dep't of Def. (*ACLU II*), 543 F.3d 59, 71 (2d Cir. 2008), *vacated*, 130 S. Ct. 777 (2009).

Defense Secretary need not name specific individuals who may be harmed by the photos' release; rather, he must simply express concern for "someone, somewhere."[194]

3. Absence of Procedural Safeguards

Lastly, and perhaps most significantly, the Protected Documents Act fails to incorporate the procedural safeguards that traditionally inhere in other FOIA exemptions. To wit, when government agencies draw on one or more of FOIA's nine exemptions to withhold information, a judicial oversight function commences. When discharging that function, courts have discretion to review an agency's determination de novo and inspect, in camera, the contents of the records at issue.[195] The Protected Documents Act, on the other hand, lacks these attendant protective measures.

Judicial review has special importance for Exemption 1, national security classifications. Indeed, Congress endorsed FOIA's judicial oversight provision "to ensure that agencies properly classify national security records and that reviewing courts remain cognizant of their authority to verify the correctness of agency classification determinations."[196] Absent verification, the American public is devoid of sufficient "assurance that national security considerations truly outweigh[] the public right to information."[197] Because the Protected Documents Act does not afford courts a procedure by which to review the Defense Secretary's determinations, his choice to withhold future detainee abuse photos in the name of national security will go largely unchecked. Therefore, forging ahead, the American public must prepare to accept the Secretary's decisions as conclusive, regardless of their veracity.

V. POLICY IMPLICATIONS FOR THE FUTURE: WHY TRANSPARENCY IS STILL NECESSARY

Before October 2009, FOIA's statutory framework maintained a proper balance. Nevertheless, the Protected Documents Act has shifted FOIA's framework from a balance to a tradeoff and has thereby replaced real accountability with hollow assurances of safety from imagined dangers within this nation's borders and abroad. Yet, an examination of the Act's manifest failures to comport with FOIA's

194. *See* Dorf, *supra* note 158.
195. 5 U.S.C. § 552(a)(4)(B) (2006).
196. GUIDE TO FOIA, *supra* note 50, at 145.
197. Dorf, *supra* note 158.

ultimate goals would be incomplete without first addressing, and then dismissing, often-asserted arguments in favor of secrecy.

A. *Arguments In Favor of Secrecy*

Legitimate reasons exist for *some* governmental secrecy. For example, "the public must understand that certain information must be kept secret in order to provide the vigorous national security we seek from the United States Government."[198] After all, complete transparency would hinder important government operations, and one cannot discount the possibility that releasing the unpublished detainee abuse photos "could help terrorist recruitment or further enrage anti-American sentiment abroad," as the government has so routinely alleged.[199] Therefore, "until the corresponding threats can be defused," constraints on informational freedom should be maintained.[200]

Interestingly, the imposition of governmental secrecy is premised on reciprocal obligations: On one hand, the government must retain its ability to keep from the public certain secrets; on the other hand, the public must trust that the government is "perform[ing] its duties to the best of its abilities."[201] Stated differently, the legitimacy of governmental secrecy hinges on public trust; absent trust, justifications for secrecy become non-existent. In light of our government's systematic denials of detainee abuse overseas when dependable sources have indicated otherwise, public trust has indeed broken down, and consequently, a continued reliance on secrecy becomes invalid.

B. *Arguments in Favor of Transparency*

The Protected Documents Act runs counter to more than forty years of established precedent that favors transparency.[202] To again place FOIA in some historical context, the statute was drafted as a response to problems previous governmental secrecy bred.[203] Its drafters understood that transparency would be a crucial aspect of a well-functioning government.[204] Likewise, since its inception, FOIA's central purpose has been "to ensure an informed citizenry, [which is] vital to the

198. Laura A. White, *The Need for Governmental Secrecy: Why the U.S. Government Must Be Able to Withhold Information in the Interest of National Security*, 43 VA. J. INT'L L. 1071, 1072 (2003).

199. Baumann, *supra* note 26; *see* Fenster, *supra* note 24, at 902.

200. White, *supra* note 198, at 1099.

201. *Id.* at 1109.

202. FOIA was enacted in 1966. *See* Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 378 (1966).

203. *See* Wells, *supra* note 26, at 1205.

204. *See* Gidiere & Forrester, *supra* note 47, at 139.

functioning of a democratic society, needed to check against corruption and to hold the [government] accountable to the governed."[205] Though it aims to achieve a lofty goal, the ideals FOIA espouses are not merely illusory. And although cognizant of this fact, through their joint authorization to suppress evidence of human rights violations perpetrated by government personnel, Congress and the Obama administration have essentially modified the foundation around which FOIA operates.

Significantly, excessive governmental secrecy yields grave societal costs. A presumption of openness fosters political accountability, sparks discussion in the marketplace of ideas, and galvanizes public opinion to support efforts to deter governmental misconduct.[206] Absent such openness, comprehensive dialogue is stymied and poor decision-making results.[207] To confirm this proposition, one needs to look no further than to the Bush administration's mysterious overseas detainment policy during the War on Terror. The unpublished detainee abuse photographs convey the truth; they provide first-hand evidence of alleged torture that occurred at the hands of U.S. troops in Iraq and Afghanistan.[208] Resigned to their own imaginations, the American public can speculate as to the impact of the photos' release: a better understanding of "what took place in the military's detention centers, and why"; revelations about "patterns that have until now gone unnoticed"; complete details about "the cruelty of such practices as stress positions, hooding and mock executions"; and most importantly, "spur[ring] calls for a more thorough investigation into prisoner abuse than has been conducted thus far."[209] To remove this speculation from the vagaries of uncertainty, the government must allow citizens to evaluate the "best evidence" of what occurred.[210]

VI. CONCLUSION

When Congress enacted FOIA more than four decades ago, it was guided by a very specific intent: "to pierce the veil of [government] secrecy and to open agency action to the light of public scrutiny."[211]

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205. N.L.R.B. v. Robbins Tires & Rubber Co., 437 U.S. 214, 242 (1978).

206. *See* Wells, *supra* note 26, at 1204-05; Calvert, *supra* note 3, at 164; Jaffer, *supra* note 189; Fenster, *supra* note 24, at 949.

207. Wells, *supra* note 26, at 1204-05.

208. Calvert, *supra* note 3, at 164.

209. Jaffer, *supra* note 189.

210. ACLU v. Dep't of Def. (*ACLU I*), 389 F. Supp. 2d 547, 578 (S.D.N.Y. 2005), *aff'd*, 543 F.3d 59 (2d Cir. 2008), *vacated*, 130 S. Ct. 777 (2009).

211. Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (internal quotations omitted).

Even in the face of terrorism and this nation's continued involvement in the War on Terror, FOIA's objectives ring as true today as they did at FOIA's inception. Since that time, the efficacy of FOIA has been measured by its ability to strike a proper balance between two competing interests: threats to security and the public's right to know and hold government actors accountable. In the past, it has been incumbent upon the President and his administration to calibrate this balance in favor of governmental transparency. Following September 11th, however, President Bush implicitly declared FOIA to be at fundamental odds with maintaining security from within and abroad. Consequently, open access became another casualty of the War on Terror.

Despite the excessive secrecy that distinguished the Bush administration from its predecessors, over the course of six years, the ACLU initiated and maintained an unrelenting battle to take the executive branch to task. Knowing that pictures of detainee abuse overseas within the government's possession would "tell an entire story instantly," the ACLU rightfully employed FOIA's request-driven mechanism to obtain irrefutable evidence of alleged governmental misconduct.[212] The lower federal courts agreed. And when the Bush administration ended its final term in office and Obama's presidency commenced, a new promise to abide by the federal courts' determinations captured the nation; the future of FOIA's ability to hold the government accountable to the governed was at stake. As this Note has demonstrated, however, President Obama's commitment has gone largely unfulfilled.

Amid the Protected Documents Act's passage, the American public now lacks access to basic evidence upon which it could once rely to shed light on potentially illegal, immoral, or embarrassing government action. Since 9/11, reports have identified roughly 300 instances of detainee abuse involving at least 570 U.S. military personnel, of which only 54 have been convicted by court-martial.[213] To date, not a single U.S. officer has been criminally convicted for these blatant human rights violations.[214] Yet, whether the unpublished detainee abuse photos could support such convictions remains an open question that, perhaps now, only the executive branch can answer.

Regardless of what the detainee abuse photos realistically authenticate, the American public remains bound, at least in the interim, by the Protected Documents Act's reality, and its results are obvious. The Act continues to shield from public scrutiny "evidence of

212. Brief for the Reporters Committee for Freedom of the Press et al., *supra* note 3, at *10-11.

213. HUMAN RIGHTS FIRST, *supra* note 11, at 2, 6.

214. *Id.* at 6.

government lawbreaking, abuse, and torture," which runs counter to the broader principles under which FOIA operates.[215] What the Protected Documents Act fails to consider is that both real and imagined threats to this nation's security, whether in the homeland or abroad, and governmental transparency can coexist. Until the Obama administration adequately addresses this consideration, FOIA's guarantees will remain illusory and the government will continue to hide from the public evidence of its own misconduct.

215. Baumann, *supra* note 26.